NO. 46903-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent

v.

CHRYSTAL ROSE COX, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.13-1-00627-8

BRIEF OF RESPONDENT

Attorneys for Respondent:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

AARON T. BARTLETT, WSBA #39710
Deputy Prosecuting Attorney

Clark County Prosecuting Attorney
1013 Franklin Street
PO Box 5000
Vancouver WA 98666-5000
Telephone (360) 397-2261

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

ANSWERS TO ASSIGNMENTS OF ERROR

I. **The trial court properly denied Ms. Cox's suppression motions because the affidavits each established probable cause.**

II. **The trial court properly refused to suppress evidence of Ms. Cox's refusal to take the breath test because refusal evidence is admissible under RCW 46.61.517 and Washington case law.**

III. **The prosecutor did not commit misconduct during closing argument because he did not minimize the State's burden of proof.**

IV. **The trial court properly denied Ms. Cox's motion for a new trial because she failed to establish misconduct and/or that there was a substantial likelihood the misconduct affected the jury's verdict.**

V. **The sentencing court properly calculated Ms. Cox's offender score based on the plain language of former RCW 9.94A.525 and the case law applying it.**

VI. **Ms. Cox did not receive ineffective assistance of counsel based on her attorney agreeing to her offender score because she can raise the issue for the first time on appeal.**

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Chrystal Cox was charged by amended information with Felony Driving While Under the Influence of Intoxicants for an incident occurring on or about March 31, 2013 and based on a prior conviction for Vehicular Assault While Under the Influence of Intoxicating Liquor or Any Drug.

CP 85. Prior to trial, Ms. Cox moved multiple times to suppress the evidence that ended up being presented, but the court denied these motions. CP 16-47; 87, 114-120. The case proceeded to trial before The Honorable Gregory Gonzales, which commenced on November 3, 2014, and concluded on November 5, 2014 with the jury's verdict. RP 286-622.

The jury found Ms. Cox guilty as charged and the trial court sentenced her to a standard range sentence of 18 months based on an offender score of three. CP 178, 184-194; RP 622-25, 670. Following her conviction, the trial court denied Ms. Cox's motion to arrest judgment or grant a new trial. CP 200-06; RP 650-59. Ms. Cox filed a timely notice of appeal. CP 183.

B. FACTUAL HISTORY

On March 31, 2013, at about 1:50 a.m. Washington State Trooper Jeffrey Heath spotted a vehicle driven by Ms. Cox travelling at a high rate of speed. RP 301-02, 324. His radar indicated that she was travelling at 83 MPH in a 60 MPH zone. RP 303. Trooper Heath turned on his overhead lights to execute a traffic stop, but Ms. Cox did not pull over right away. RP 303, 326.

Once pulled over, Trooper Heath contacted Ms. Cox at the passenger side window. RP 304. Ms. Cox had some trouble getting the window down, but once she did Trooper Heath detected an obvious odor

of intoxicants emanating from the vehicle in which Ms. Cox was the sole occupant. RP 304-05, 328. According to Trooper Heath, Ms. Cox was extremely agitated and argumentative from the beginning of his contact with her. RP 305, 329, 331. He also observed her to have slurred speech, red eyes, and an obvious odor of alcohol on her breath. RP 305, 330, 333. Ms. Cox, however, claimed that she had not been drinking alcohol. RP 330.

Because Ms. Cox would not stop arguing with Trooper Heath, the full field sobriety tests (FSTs) were not administered and he called Trooper Ben Taylor to the scene. RP 303, 305-07. When Trooper Taylor arrived at the scene, Trooper Heath explained to him what was going on and also stated that he (Trooper Heath) was not sure if Ms. Cox was impaired. RP 305-06, 365. Ms. Cox agreed to do the field sobriety tests with Trooper Taylor. RP 366. Trooper Taylor had Ms. Cox do a modified version of the horizontal gaze nystagmus test as well as the vertical gaze nystagmus test. RP 366-371, 394-96. According to Trooper Taylor, Ms. Cox presented with both horizontal gaze nystagmus and vertical gaze nystagmus. RP 370-71. Ms. Cox also failed the walk-and-turn test and the one-leg-stand test. RP 371-76, 389-390, 403. During his contact with Ms. Cox, Trooper Taylor detected the odor of alcohol on Ms. Cox's breath. RP 377, 381. Following the administration of the FSTs, Trooper Taylor

arrested her for Driving Under the Influence of Intoxicants and escorted her back to Trooper Heath. RP 377.

Once Ms. Cox was back with Trooper Heath, he advised her of her right to a breath test and she refused to do the test. RP 307. As a result, and combined with the fact of her prior vehicular assault conviction, Trooper Heath applied for a search warrant so that Ms. Cox's blood could be drawn and tested for drugs and alcohol. RP 307-08, 311-12, 345. The search warrant was approved and Ms. Cox was taken to the hospital for the blood draw and then taken to jail. RP 313-319.

Ms. Cox's blood tested positive for blood ethanol (0.10 grams per milliliters), methamphetamine (0.50 milligrams per liter), and amphetamine (0.06 milligrams per liter). RP 440-42. The State toxicologist testified that the amount of methamphetamine in Ms. Cox's blood was ten times higher than the high end of the therapeutic level. RP 442, 456. He also testified about how alcohol and methamphetamine would interact and affect the body. RP 443-46, 456-58, 462-63.

Additionally, the State presented evidence of Ms. Cox's prior conviction for Vehicular Assault While Under the Influence of Intoxicating Liquor or Any Drug by way of a Judgment and Sentence. RP 465-471, 476-79. The State's identification specialist testified that the

finger prints on that Judgement and Sentence matched Ms. Cox's fingerprints and, as a result, that Judgement and Sentence was admitted into evidence. RP 476-79.

Ms. Cox testified at trial. She claimed that she was not impaired on the morning in question, but did admit to drinking two shots of whiskey and one shot of tequila as well as consuming a small amount of methamphetamine in her prior morning's coffee. RP 481-485, 487. She indicated that she drank the first shot between 12:30 and 12:50 a.m., the second shot at 1:00 a.m., and the third shot between 1:25 and 1:30 a.m. as she was heading out of the door of the bar on her way to her car. RP 481-84. According to Ms. Cox, she was pulled over by Trooper Heath mere minutes after leaving the bar. RP 483.

Ms. Cox also called an expert to testify on her behalf. The expert reviewed the police reports, the video of the incident, the laboratory report on Ms. Cox's blood, and listened to her testimony. He concluded that Ms. Cox's blood alcohol level was likely lower at the time she was driving, as compared to the level noted in the toxicology report, based on her testimony of when she had the drinks and how alcohol is absorbed into the blood stream. RP 492-98. He also opined that Ms. Cox behaved differently in the video of the incident than one would expect if one had a

methamphetamine level of .50. RP 500-02. Ms. Cox's expert acknowledged that the methamphetamine level in Ms. Cox's blood was not consistent with her testimony of having a small amount of methamphetamine in her coffee the previous morning. RP 514.

ARGUMENT

I. The trial court properly denied Ms. Cox's motions to suppress because the affidavits established probable cause.

Under both the Constitution of the United States and Washington's Constitution, a search warrant may issue only upon a determination of probable cause. State v. Thein, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). "Probable cause exists if the affidavit in support of the warrant sets forth facts and circumstances sufficient to establish a reasonable inference that the defendant is probably involved in criminal activity and that evidence of the crime can be found at the place to be searched." Id. Accordingly, probable cause requires "a nexus between criminal activity and the item to be seized, and also a nexus between the item to be seized and the place to be searched." Id.

A search warrant "affidavit is not required to establish a prima facie case of guilt, but rather a likelihood that evidence of criminal activity will be found." State v. Maddox, 152 Wn.2d 499, 510-11, 98 P.3d 1199 (2004)

(citation omitted). In making such a determination, a magistrate can take into account the "experience and expertise" of the officer who authored the search warrant affidavit. Id., at 505, 511. Furthermore, a suspect's prior convictions "may be used in determining probable cause, particularly when a prior conviction is for a crime of the same general nature." Maddox, 152 Wn.2d at 512 (citations omitted); State v. Neth, 165 Wn.2d 177, 185-86, 196 P.3d 658 (2008).

A judge exercises judicial discretion in determining whether to issue a search warrant. State v. Vickers, 148 Wn.2d 91, 108, 59 P.3d 58 (2002). That decision "is reviewed for abuse of discretion." Id. A search warrant, once issued, is entitled to "a presumption of validity" and reviewing courts shall accord "great deference to the magistrate's determination of probable cause." State v. Chenoweth, 160 Wn.2d 454, 477, 158 P.3d 595 (2007); Vickers, 148 Wn.2d at 108; State v. O'Connor, 39 Wn.App 113, 123, 692 P.2d 208 (1984) ("Both the superior court and [the Court of Appeals] are required to give great weight to a magistrate's determination that probable cause exists . . .") (emphasis added).

As a result, "[d]oubts concerning the existence of probable cause are generally resolved in favor" of the validity of the search warrant. Vickers, 148 Wn.2d at 108-109; Chenoweth, 160 Wn.2d at 477. Moreover, reviewing courts are to examine affidavits in support of a

search warrant in "a commonsense, not a hypertechinal manner." State v. Ollivier, 178 Wn.2d 813, 847, 312 P.3d 1 (2013) (citations omitted). Because at a suppression hearing on a search warrant the trial court acts in an "appellate-like capacity," a higher appellate court, while still deferring to the magistrate's determination, reviews de novo the "trial court's assessment of probable cause." Neth, 165 Wn.2d at 182 (citing State v. Chamberlin, 161 Wn.2d 30, 40-41, 162 P.3d 389 (2007)).

When a trial court, in reviewing a search warrant affidavit, concludes that the affidavit contains material misrepresentations it shall not consider those misrepresentations when determining whether the affidavit supports probable cause. State v. Garrison, 118 Wn.2d 870, 872-873, 827 P.2d 1388 (1992); Franks v. Delaware, 438 U.S. 155, 98 S.Ct. 2674 (1978). "If the affidavit with the matter deleted . . . remains sufficient to support a finding of probable cause, the suppression motion fails. . . ." Id. at 873.

a. The warrant for the blood draw

Ms. Cox argues that with Trooper Heath's misstatement(s) deleted from the search warrant affidavit that not enough evidence remained to establish probable cause that she was driving under the influence of intoxicants. Br. of App. at 20. But the affidavit, which still included information that Ms. Cox (1) was driving 83 MPH in a 60 MPH speed

zone; (2) was slow to respond to Trooper Heath's overhead lights; (3) was argumentative; (4) was alone in a vehicle that had a strong odor of intoxicants; (5) had slurred speech; (6) had bloodshot and watery eyes; and (7) failed the field sobriety tests administered by Trooper Taylor, was sufficient to establish probable cause. CP 73-76. Additionally, probable cause was bolstered by the fact that the affidavit also established that Ms. Cox refused to perform a breath alcohol test and had a prior conviction for vehicular assault. CP 76.

The only information the trial court actually struck from the affidavit is the information that Trooper Heath "asked Cox to submit to voluntary standardized field sobriety tests" because the dash cam showed that he did not tell her they were voluntary. RP 153-158; Conclusion of Law No. 2. Thus, for example, the trial court stated:

> And here the case law does support the position that if I excise or take out Trooper Heath's statements that were miscommunicated to the magistrate, I then determine whether or not there was probable cause. And according to my findings, there still would be probable cause. The statement about whether or not he conducted voluntary FSTs with Ms. Cox is not relevant to the finding of probable cause.

RP 157 (emphasis added). Moreover, the trial court reiterated its position after Ms. Cox sought further argument on the issue, stating:

> And if you look at it, the only issue I had with respect to Trooper Heath was the fact that he testified or stated in his

> affidavit that the1 FST with Ms. Cox was voluntary, which we know was not. On the video, he declared, 'In order to prove that you're telling the truth, I need you to do the test,' is what he stated. If I take that away from the probable cause affidavit, the rest of it still remains.

RP 161 (emphasis added).

Notably, while Ms. Cox continues to complain that the wording of the affidavit left it unclear whether Trooper Heath or Trooper Taylor administered the field sobriety tests, the trial court did not strike Ms. Cox's failure of the field sobriety tests from the affidavit. RP 165-168, 170; Conclusions of Law Nos. 3, 6-8; Br. of App. at 19. Consequently, her failure was properly part of the probable cause determination. Even at the trial level Ms. Cox had to concede that "[t]here are two sentences there where I suppose one could say that it's implied that Trooper Taylor performed the field sobriety test, but he does not say that." RP 163. And the trial court, complying with the law that warrant affidavits are supposed to be read in a commonsense manner, and not in a hyper-technical one, read the affidavit to mean that Trooper Taylor conducted the field sobriety tests with Ms. Cox and that she failed them. RP 167-170. When taken as whole, the magistrate did not abuse its discretion when it found probable cause—there was substantial evidence that Ms. Cox was under the

[1] Trooper Heath did have Ms. Cox do the HGN test before Trooper Taylor showed up to administer the full battery of field sobriety tests, including the HGN. RP 19-20, 95-104.

influence of intoxicants—and the trial court did not err when it denied Ms. Cox's suppression motion.

b. The testing of the blood

Here, Ms. Cox filed a motion to suppress the results of the first blood test pursuant to the Court of Appeals' decision in State v. Martines, which held that a warrant authorizing the seizure of blood did not also authorize the testing of the blood. 182 Wn.App. 519, 331 P.3d 105 (2014); RP 3-8; 182-187. Relying on Martines, the trial suppressed those results, stating that "since there was not a search warrant to test the blood, that would be invalid under the current state of law to present evidence of that testing." RP 187. The State, in preparation of suppression, had Trooper Heath author a second search warrant affidavit to authorize the testing of Ms. Cox's blood, which was granted. CP 122-128. The trial court did not suppress the results of the second blood test. RP 243, 245. Furthermore, following the resolution of this case, our Supreme Court reversed the Court of Appeals in Martines, and held that "a warrant authorizing extraction of a blood sample necessarily authorizes testing of that sample for evidence of the suspected crime." --- Wn.2d ---, --- P.3d ---, 2015 WL 5076693 at 6 (2015).

As a result, the first search warrant affidavit properly authorized all of the testing of Ms. Cox's blood and was supported by probable cause as

found by the magistrate, trial court, and as discussed above. Moreover, the second search warrant affidavit was supported by probable cause because it made clear that probable cause to suspect Ms. Cox had committed the crime of DUI had already been found by a judge who authorized a seizure of her blood on that basis. CP 123-28. Because the probable cause found by the first magistrate, by law, sufficed to allow the testing of the blood, the second magistrate's finding of probable cause to search, which relied on the first warrant, is necessarily supported by probable cause and led to the valid search of Ms. Cox's blood. Straightforwardly then, the magistrate did not abuse its discretion when it found probable cause to search (test) the blood of Ms. Cox, and the trial court did not err when it denied Ms. Cox's suppression motion.

II. The trial court properly admitted evidence of Ms. Cox's refusal to submit to a breath test.

"Questions of relevancy and the admissibility of testimonial evidence are within the discretion of the trial court, and we review them only for manifest abuse of discretion." State v. Aguirre, 168 Wn.2d 350, 361, 229 P.3d 669 (2010); State v. Martin, 169 Wn.App. 620, 628, 281 P.3d 315 (2012) ("The admissibility of evidence is within the sound discretion of the trial court and an appellate court will not disturb that decision unless no reasonable person would adopt the trial court's view.")

(citations omitted). When a trial court's ruling on such matters of evidence is in error, reversal will only be required "if there is a reasonable possibility that the testimony would have changed the outcome of trial." Aguirre, 168 Wn.2d at 361 (citing State v. Fankhouser, 133 Wn.App. 689, 695, 138 P.3d 140 (2006). Moreover, appellate courts "may affirm the trial court's ruling on any grounds the record supports, including those the trial court did not explicitly articulate." State v. Moore, 178 Wn.App. 489, 498, 314 P.3d 1137 (2013) (citing State v. Ginn, 128 Wn.App. 872, 884 n. 9, 117 P.3d 1155 (2005)).

Under RCW 46.61.517, "[t]he refusal of a person to submit to a test of the alcohol or drug concentration in the person's blood or breath under RCW 46.20.308 is admissible into evidence at a subsequent criminal trial." Accordingly, Washington courts have long held, relying in part on RCW 46.61.517, that the refusal of a driver-cum-defendant to submit to a breath or blood test is admissible at trial to infer guilt. State v. Long, 113 Wn.2d 266, 272-73, 778 P.2d 1027 (1989); State v. Baldwin, 109 Wn.App. 516, 526-528, 37 P.3d 1220 (2001); State v. Cohen, 125 Wn.App. 220, 224-25, 104 P.3d 70 (2005). "The rationale for admission of refusal evidence is that a refusal to take the test demonstrates the driver's consciousness of guilt." Cohen, 125 Wn.App. at 224. Based on the specific facts of each case, however, the trial court may exclude the refusal

to perform a sobriety test if its probative value is outweighed by the danger of unfair prejudice or confusion of the jury. ER 403; Cohen, 125 Wn.App. at 225-26.

Ms. Cox does not make an argument that the breath test refusal was inadmissible under ER 403; instead, she argues that by admitting evidence of her refusal the trial court violated her Fifth Amendment rights. Br. of App. at 22-24.2 But, "Fifth Amendment values are not offended when the state offers a suspect the choice of taking a blood[, or breath] alcohol test or using his refusal against him. This is true because there is no constitutional right not to take the blood[, or breath] alcohol test." City of Seattle v. Stalsbroten, 138 Wn.2d 227, 235-38, 978 P.2d 1059 (1999); South Dakota v. Neville, 459 U.S. 553, 562, 103 S.Ct. 916, 74 L.Ed.2d 748 (1983); State v. Zwicker, 105 Wn.2d 228, 713 P.2d 1101 (1986); Long, 113 Wn.2d at 272-73.3 Consequently, pursuant to RCW 46.61.517 and the above cited case law, the trial court properly admitted Ms. Cox's refusal to take the breath test into evidence.

Even if, however, the trial court erred in admitting Ms. Cox's refusal to take the breath test into evidence there is not a reasonable

---

[2] Ms. Cox makes no attempt to distinguish the cases she cites from the cases that directly reject the argument she makes. *See Infra.*

[3] *But see Missouri v. McNeely*, --- U.S. ----, 133 S.Ct. 1552, 185 L.Ed.2d 696 (2013) (holding that during DUI investigations the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a *blood test* without a warrant.)

possibility that the suppression of that evidence would have resulted in her acquittal. Here, unlike in many DUI trials, the refusal evidence was barely on the periphery; the troopers each mentioned her refusal and moved on, and in its closing argument the State did not even explicitly argue that the jury should draw an inference of guilt from the refusal. RP 307, 376, 570 ("You heard testimony from Trooper Heath that he read her her warnings for breath and she refused to provide a breath sample."). The results of the blood test, Ms. Cox's failing of the FSTs, her behavior at the scene, and her admissions at trial to drinking alcohol shots and consuming methamphetamine secured the guilty verdict and the results would not have been different had the jury not heard that she refused the breath test.

III. The State did not engage in prejudicial misconduct during its closing argument.

At trial, "[c]ounsel are permitted latitude to argue the facts in evidence and reasonable inferences" in their closing arguments. State v. Smith, 104 Wn.2d 497, 510, 707 P.2d 1306 (1985). Any allegedly improper statements by the State in closing arguments "should be viewed within the context of the prosecutor's entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions." State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.2d 432 (2003) (citing State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)). Juries are presumed to

follow jury instructions absent evidence to contrary. State v. Kirkman, 159 Wn.2d 918, 928, 155 P.3d 125 (2007) (citing State v. Davenport, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984)).

A prosecutor's argument that misstates the burden of proof is misconduct. State v. Warren, 165 Wn.2d 17, 26-27, 195 P.3d 940 (2008). The invocation of "Occam's razor" as a way to analyze the evidence during a closing argument can fall within the considerable latitude permitted to parties in "discussing . . . the evidence and the inferences and deductions arising therefrom." State v. Clark, 2014 UT App. 56, 322 P.3d 761, 773-74 (Utah 2014). If the defendant can establish that prosecutorial misconduct occurred, then "the defendant must show that the prosecutor's misconduct resulted in prejudice that had a substantial likelihood of affecting the jury's verdict. State v. Emery, 174 Wn.2d 741, 759-60, 278 P.3d 653 (2012). That said, a prosecutor's "remarks even if they are improper, are not grounds for reversal if they were invited or provoked by defense counsel and are in reply to his or her acts and statements, unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective." State v. Gentry, 125 Wn.2d 570, 643-44, 888 P.2d 1005 (1995) (citing State v. Russell, 125 Wn.2d 24, 85–86, 882 P.2d 747 (1994)).

Here, during the State's rebuttal argument, the State argued:

> There's a phrase called Occam's razor, and it means that usually the most reasonable explanation is the correct one. In this case, we have defendant's speed, we have her odor of intoxicants, bloodshot, watery eyes, and slurred speech. We have her performance on the field sobriety tests. We have her demeanor with Trooper Heath, and we have the results from her blood test.
>
> He talked about competence of that blood test. You'll get this back there with you, and it states on it there's a 99.7 percent competence level. Most reasonable explanation is usually the correct one.
>
> [MS. COX]: Your Honor, I have to object. This argument is lowering the State's burden.
>
> THE COURT: So noted. It's beyond4 a reasonable doubt. They have that information in front of them. You may argue beyond a reasonable doubt, Counsel.
>
> [STATE]: He said you'll get that instruction that says a reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. But if from such consideration you have an abiding belief in the truth of the charge, you're satisfied beyond a reasonable doubt.

RP 610-11 (emphasis added). The State's argument did not lower its burden of proof but rather explained that its inferences from the evidence were more reasonable than Ms. Cox's. That an explanation for the evidence that is reasonable and matches up with what has been presented

[4] Ms. Cox's brief contains a typographical error in which "beyond" is inadvertently left out her quotation of the trial court. Br. of App. at 27.

is more likely to be correct than an implausible theory is a commonsense argument and not a lowering of the burden of proof.

Assuming, arguendo, the State committed misconduct in its rebuttal argument, the trial court quickly and correctly instructed the jury that the State's burden was beyond a reasonable doubt. Moreover, the jury received written instructions properly explaining the burden of proof, and the State did not return to its argument, but instead read from the jury instruction on beyond a reasonable doubt. CP 160. Accordingly, any prejudice was cured. Additionally, Ms. Cox cannot show that the prosecutor's misconduct resulted in prejudice that had a substantial likelihood of affecting the jury's verdict where she failed the FSTs, had a blood sample that tested at .10 for alcohol and .50 for methamphetamine, admitted to using each substance, was speeding, had the odor of intoxicants on her breath, had bloodshot, watery eyes, slurred speech, and was argumentative with the Trooper. The evidence in this case was very strong.

IV. The trial court properly denied Ms. Cox's motion for a new trial.

Pursuant to CrR 7.5 a trial court may grant a defendant's motion for a new trial when "it affirmatively appears that a substantial right of the defendant was materially affected" by the "misconduct of the

prosecution." CrR 7.5(2). Our Supreme Court "has repeatedly stated that "[t]he granting or denial of a new trial is a matter primarily within the discretion of the trial court and [that the reviewing court] will not disturb its ruling unless there is a clear abuse of discretion." State v. McKenzie, 157 Wn.2d. 44, 51, 134 P.3d 221 (2006) (alterations in original) (citations and internal quotation omitted). Furthermore, an abuse of discretion occurs only when no reasonable judge would have reached the same conclusion. Id. at 52. That the standard of review is an abuse of discretion is appropriate because the trial court is in the best position to determine whether the complained of error prevented the defendant from having a fair trial. Id. at 52; State v. Marks, 71 Wn.2d 295, 302, 427 P.2d 1008 (1967) (quoting State v. Taylor, 60 Wn.2d 32, 42, 371 P.2d 617, 622 (1962)).

When a defendant moves for a new trial based on prosecutorial misconduct, the defendant bears the burden, at the trial court level, "'of establishing the impropriety of the prosecuting attorney's comments and their prejudicial effect.'" Id. at 52 (quoting State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)). Accordingly, the defendant must prove to the trial court, under the prejudice prong, that based on prosecutor's misconduct there is a "substantial likelihood the misconduct affected the jury's verdict." Id. (internal quotation omitted).

Here, Ms. Cox's arguments fail for the same reason they failed in the preceding section. Moreover, the trial court properly found that Ms. Cox failed to establish her burden that there was a substantial likelihood that the State's argument affected the jury's verdict and that any prejudice was cured by the court's contemporaneous oral instruction and the written instructions provided to the jury. RP 655-56.

V. The trial court properly calculated Ms. Cox's offender score.

An offender score calculation is reviewed de novo. State v. Bergstrom, 162 Wn.2d 87, 92, 169 P.3d 816 (2007). The objective in interpreting a statute is to ascertain and carry out the legislature's intent. State v. Kintz, 169 Wn.2d 537, 547, 238 P.3d 470 (2010). Courts are to first look to the statute's plain meaning to determine legislative intent. State v. Polk, 187 Wn.App. 380, 348 P.3d 1255, 1260 (2015). Where the meaning of statutory language is plain on its face, i.e., unambiguous, courts shall consider that plain meaning to be the legislative intent. State v. Alvarado, 164 Wn.2d 556, 562, 192 P.3d 345 (2008). In discerning the plain meaning of a statute, reviewing courts shall consider all that the legislature has said in the statute and related statutes that disclose legislative intent. State v. Winkle, 159 Wn.App. 323, 328, 245 P.3d 249 (2011). Importantly, interpretations rendering any portion of a statute

meaningless should not be adopted, and constructions that result in unlikely or absurd results should be avoided. State v. Keller, 143 Wn.2d 267, 277, 19 P.3d 1030 (2001).

The statute at issue here is former RCW 9.94A.5255 and the issue is how to calculate Ms. Cox's offender score under that statute given her conviction for a felony traffic offense. Our Supreme Court has held that to properly calculate an offender score under the statute one must follow a three step process: "(1) identify all prior convictions; (2) eliminate those that wash out; (3) 'count' the prior convictions that remain in order to arrive at an offender score." State v. Moeurn, 170 Wn.2d 169, 175, 240 P.3d 1158 (2010).

Thus, the first step is to identify all of Ms. Cox's prior convictions. "A prior conviction is a conviction which exists before the date of sentencing for the offense for which the offender score is being computed." Former RCW 9.94A.525(1). Ms. Cox's convictions for Vehicular Assault and Possession of a Controlled Substance each existed prior to the date of her sentencing and were, thus, properly considered "prior convictions." CP 186, 194.

The next step, pursuant to Moeurn, is to determine whether Ms. Cox's two prior felony convictions "wash out." 170 Wn.2d at 175. Former

[5] Attached as Appendix A.

RCW 9.94A.525(2) includes several provisions dictating when prior convictions wash out. First, subsection (2)(a) provides that certain felonies never wash out: "Class A and sex prior felony convictions shall always be included in the offender score." Subsection (2)(b) provides that class B felonies, other than sex offenses, wash out after the offender spends ten crime-free years in the community. Subsection (2)(c) and (2)(d) provide that class C felonies (other than sex offenses) and "serious traffic offenses" wash out after the offender spends five crime-free years in the community, except as provided in subsection (2)(e). Former subsection (2)(e) contains special rules relating to when certain traffic-related offenses will wash out when the present offense being scored is felony DUI or felony physical control. In essence, former subsection (2)(e) provides that prior convictions for serious traffic offenses and felony DUI/physical control wash out after five years except if they were considered "prior offenses within ten years," as defined elsewhere.

Thus, the plain language of the statute ("except as provided in subsection (2)(e)") makes clear that subsection (2)(e) operates as an exception to the regular wash-out provisions of subsections (2)(c) and (2)(d), reviving certain class C felonies and serious traffic offenses that would otherwise wash out under (2)(c) and (2)(d), but only where the present conviction is for felony DUI or felony physical control:

> (e) If the present conviction is felony driving while under the influence of intoxicating liquor or any drug (RCW 46.61.502(6)) or felony physical control of a vehicle while under the influence of intoxicating liquor or any drug (RCW 46.61.504(6)), prior convictions of felony driving while under the influence of intoxicating liquor or any drug, felony physical control of a vehicle while under the influence of intoxicating liquor or any drug, and serious traffic offenses shall be included in the offender score if: (i) The prior convictions were committed within five years since the last date of release from confinement (including full-time residential treatment) or entry of judgment and sentence; or (ii) the prior convictions would be considered "prior offenses within ten years" as defined in RCW 46.61.5055.

Former RCW 9.94A.525(2)(e). By its plain language, this provision addresses only when prior convictions for felony DUI/physical control and serious traffic offenses wash out when the defendant is convicted of felony DUI or felony physical control. It does not address the wash-out of felony convictions other than those specified, so it does not govern whether such convictions are included in the offender score, or under what circumstances they are eliminated from the offender score. Simply put, subsection (2)(e) is irrelevant to whether other prior felony convictions, e.g., drug convictions, count toward the offender score of one convicted of felony DUI.

After identifying all prior convictions under subsection (1), and eliminating those that wash out under subsection (2), the final step is to "'count' the prior convictions that remain in order to arrive at an offender

score." Moeurn, 170 Wn.2d at 175. In the version of the statute applicable here, subsections (3) through (21) provide specific rules regarding the calculation of offender scores, instructing courts to count prior offenses by assigning different numerical values to the prior offenses. Former RCW 9.94A.525(3)-(21). Subsection (11) applies "[i]f the present conviction is for a felony traffic offense," which includes felony DUI. Former RCW 9.94A.525(11); RCW 9.94A.030(25)(a). It directs the court to count two points for each adult or juvenile conviction for Vehicular Homicide or Vehicular Assault and one point for each adult felony conviction. Former RCW 9.94A.525(11). Because Ms. Cox did not complete the requisite crime-free years in the community, the trial court properly counted her prior Vehicular Assault conviction as 2 points, her Possession of a Controlled Substance conviction as 1 point, and calculated her offender score as 3 points for the purposes of sentencing her on her felony DUI conviction. CP 186, 194.

Ms. Cox cites State v. Morales and State v. Jacob for the proposition that pursuant to former RCW 9.94A.525(2)(e) "only prior felony DUI convictions, misdemeanor DUI convictions (as serious traffic offenses) and felony physical control convictions are to be included in determining the offender score" when one is being sentenced for a felony DUI. Br. of App. at 32-33; 168 Wn.App. 489, 278 P.3d 668 (2012); 176

Wn.App. 351, 308 P.3d 800 (2013). But the reasoning of those cases has been thoroughly rejected by State v. McAninch, --- Wn.App. ----, --- P.3d. ----, 2015 WL 4916399, and State v. Hernandez, 185 Wn.App. 680, 342 P.3d 820 (2015), and is inconsistent with offender score calculation procedure that is dictated by Moeurn and explained above. 170 Wn.2d. at 175.6 As McAninch noted:

> [n]either Morales nor Jacob cited RCW 9.94A.525(11) and the fact that subsection (11) directly addresses offender score calculations for felony traffic offenses. In relying exclusively on former RCW 9.94A.525(2)(e) to determine an offender score for felony DUI, both Morales and Jacob effectively read subsection (11) out of the statute and failed to consider the statute as a whole.

2015 WL 4916399, at 3.[7] Similarly, Hernandez held that to read subsection 2(e) like Morales and Jacob to mean that "solely those crimes specifically enumerated in the subsection could count in an offender score calculation for a felony DUI" would lead "to strained and absurd results" to include rendering subsection (2)(a) (class A and sex felonies never wash out) meaningless. 185 Wn.App. at 686-87; McAninch, 2015 WL 4916399 at 3.

---

[6] This issue is currently pending in front of our Supreme Court by way of *State v. Sandholm* an unpublished case that interpreted former RCW 9.94A.525 consistent with *Morales* and *Jacobs*. 179 Wn.App. 1030, 2014 WL 645031 (Oral Argument held on November 18, 2014)

[7] For the purpose of added clarity both *State v. McAninch* and *State v. Jacob* were decided by Division II of the Court of Appeals and in 2015 and 2013, respectively. And *State v. Hernandez* was decided by Division III in 2015, while Division I decided *State v. Morales* in 2012.

Here, under the plain meaning of former RCW 9.94A.525, and in accordance with McAninch, Hernandez, and Moeurn, the trial court properly calculated Ms. Cox's offender score by complying with all the applicable sections of the statute. Moreover, in addition to the State, Ms. Cox and her trial attorney assented to such a calculation.[8] Thus, Ms. Cox was sentenced with the correct offender score.

CONCLUSION

For the reasons argued above, Ms. Cox's conviction and sentence should be affirmed.

DATED this 24 day of Sept., 2015.

Respectfully submitted:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

By: _____
AARON T. BARTLETT, WSBA #39710
Deputy Prosecuting Attorney

[8] The State does not address Ms. Cox's ineffective assistance argument as it relates to her sentencing because it agrees that she may raise the issue directly on appeal.

Appendix A

FORMER RCW 9.94A.525 (2011)

9.94A.525. Offender score
The offender score is measured on the horizontal axis of the sentencing grid. The offender score rules are as follows:

The offender score is the sum of points accrued under this section rounded down to the nearest whole number.

(1) A prior conviction is a conviction which exists before the date of sentencing for the offense for which the offender score is being computed. Convictions entered or sentenced on the same date as the conviction for which the offender score is being computed shall be deemed "other current offenses" within the meaning of RCW 9.94A.589.

(2)(a) Class A and sex prior felony convictions shall always be included in the offender score.

(b) Class B prior felony convictions other than sex offenses shall not be included in the offender score, if since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent ten consecutive years in the community without committing any crime that subsequently results in a conviction.

(c) Except as provided in (e) of this subsection, class C prior felony convictions other than sex offenses shall not be included in the offender score if, since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent five consecutive years in the community without committing any crime that subsequently results in a conviction.

(d) Except as provided in (e) of this subsection, serious traffic convictions shall not be included in the offender score if, since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender spent five years in the community without committing any crime that subsequently results in a conviction.

(e) If the present conviction is felony driving while under the influence of intoxicating liquor or any drug (RCW 46.61.502(6)) or felony physical control of a vehicle while under the influence of intoxicating liquor or any drug (RCW 46.61.504(6)), prior convictions of felony driving while under the influence of intoxicating liquor or any drug, felony physical control of a vehicle while under the influence of intoxicating liquor or any drug, and serious traffic offenses shall be included in the offender score if: (i) The prior convictions were committed within five years since the last date of release from confinement (including full-time residential treatment) or entry of judgment and sentence; or (ii) the prior convictions would be considered "prior offenses within ten years" as defined in RCW 46.61.5055.

(f) Prior convictions for a repetitive domestic violence offense, as defined in RCW 9.94A.030, shall not be included in the offender score if, since the last date of release from confinement or entry of judgment and sentence, the offender had spent ten consecutive years in the community without committing any crime that subsequently results in a conviction.

(g) This subsection applies to both adult and juvenile prior convictions.

(3) Out-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law. Federal convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law. If there is no clearly comparable offense under Washington law or the offense is one that is usually considered subject to exclusive federal jurisdiction, the offense shall be scored as a class C felony equivalent if it was a felony under the relevant federal statute.

(4) Score prior convictions for felony anticipatory offenses (attempts, criminal solicitations, and criminal conspiracies) the same as if they were convictions for completed offenses.

(5)(a) In the case of multiple prior convictions, for the purpose of computing the offender score, count all convictions separately, except:

(i) Prior offenses which were found, under RCW 9.94A.589(1)(a), to encompass the same criminal conduct, shall be counted as one offense, the offense that yields the highest offender score. The current sentencing court shall determine with respect to other prior adult offenses for which

sentences were served concurrently or prior juvenile offenses for which sentences were served consecutively, whether those offenses shall be counted as one offense or as separate offenses using the "same criminal conduct" analysis found in RCW 9.94A.589(1)(a), and if the court finds that they shall be counted as one offense, then the offense that yields the highest offender score shall be used. The current sentencing court may presume that such other prior offenses were not the same criminal conduct from sentences imposed on separate dates, or in separate counties or jurisdictions, or in separate complaints, indictments, or informations;

(ii) In the case of multiple prior convictions for offenses committed before July 1, 1986, for the purpose of computing the offender score, count all adult convictions served concurrently as one offense, and count all juvenile convictions entered on the same date as one offense. Use the conviction for the offense that yields the highest offender score.

(b) As used in this subsection (5), "served concurrently" means that: (i) The latter sentence was imposed with specific reference to the former; (ii) the concurrent relationship of the sentences was judicially imposed; and (iii) the concurrent timing of the sentences was not the result of a probation or parole revocation on the former offense.

(6) If the present conviction is one of the anticipatory offenses of criminal attempt, solicitation, or conspiracy, count each prior conviction as if the present conviction were for a completed offense. When these convictions are used as criminal history, score them the same as a completed crime.

(7) If the present conviction is for a nonviolent offense and not covered by subsection (11), (12), or (13) of this section, count one point for each adult prior felony conviction and one point for each juvenile prior violent felony conviction and ½ point for each juvenile prior nonviolent felony conviction.

(8) If the present conviction is for a violent offense and not covered in subsection (9), (10), (11), (12), or (13) of this section, count two points for each prior adult and juvenile violent felony conviction, one point for each prior adult nonviolent felony conviction, and ½ point for each prior juvenile nonviolent felony conviction.

(9) If the present conviction is for a serious violent offense, count three points for prior adult and juvenile convictions for crimes in this category,

two points for each prior adult and juvenile violent conviction (not already counted), one point for each prior adult nonviolent felony conviction, and ½ point for each prior juvenile nonviolent felony conviction.

(10) If the present conviction is for Burglary 1, count prior convictions as in subsection (8) of this section; however count two points for each prior adult Burglary 2 or residential burglary conviction, and one point for each prior juvenile Burglary 2 or residential burglary conviction.

(11) If the present conviction is for a felony traffic offense count two points for each adult or juvenile prior conviction for Vehicular Homicide or Vehicular Assault; for each felony offense count one point for each adult and ½ point for each juvenile prior conviction; for each serious traffic offense, other than those used for an enhancement pursuant to RCW 46. 61.520(2), count one point for each adult and ½ point for each juvenile prior conviction; count one point for each adult and ½ point for each juvenile prior conviction for operation of a vessel while under the influence of intoxicating liquor or any drug.

(12) If the present conviction is for homicide by watercraft or assault by watercraft count two points for each adult or juvenile prior conviction for homicide by watercraft or assault by watercraft; for each felony offense count one point for each adult and ½ point for each juvenile prior conviction; count one point for each adult and ½ point for each juvenile prior conviction for driving under the influence of intoxicating liquor or any drug, actual physical control of a motor vehicle while under the influence of intoxicating liquor or any drug, or operation of a vessel while under the influence of intoxicating liquor or any drug.

(13) If the present conviction is for manufacture of methamphetamine count three points for each adult prior manufacture of methamphetamine conviction and two points for each juvenile manufacture of methamphetamine offense. If the present conviction is for a drug offense and the offender has a criminal history that includes a sex offense or serious violent offense, count three points for each adult prior felony drug offense conviction and two points for each juvenile drug offense. All other adult and juvenile felonies are scored as in subsection (8) of this section if the current drug offense is violent, or as in subsection (7) of this section if the current drug offense is nonviolent.

(14) If the present conviction is for Escape from Community Custody, RCW 72.09.310, count only prior escape convictions in the offender score. Count adult prior escape convictions as one point and juvenile prior escape convictions as ½ point.

(15) If the present conviction is for Escape 1, RCW 9A.76.110, or Escape 2, RCW 9A.76.120, count adult prior convictions as one point and juvenile prior convictions as ½ point.

(16) If the present conviction is for Burglary 2 or residential burglary, count priors as in subsection (7) of this section; however, count two points for each adult and juvenile prior Burglary 1 conviction, two points for each adult prior Burglary 2 or residential burglary conviction, and one point for each juvenile prior Burglary 2 or residential burglary conviction.

(17) If the present conviction is for a sex offense, count priors as in subsections (7) through (11) and (13) through (16) of this section; however count three points for each adult and juvenile prior sex offense conviction.

(18) If the present conviction is for failure to register as a sex offender under RCW *9A.44.130 or 9A.44.132, count priors as in subsections (7) through (11) and (13) through (16) of this section; however count three points for each adult and juvenile prior sex offense conviction, excluding prior convictions for failure to register as a sex offender under RCW *9A.44.130 or 9A.44.132, which shall count as one point.

(19) If the present conviction is for an offense committed while the offender was under community custody, add one point. For purposes of this subsection, community custody includes community placement or postrelease supervision, as defined in chapter 9.94B RCW.

(20) If the present conviction is for Theft of a Motor Vehicle, Possession of a Stolen Vehicle, Taking a Motor Vehicle Without Permission 1, or Taking a Motor Vehicle Without Permission 2, count priors as in subsections (7) through (18) of this section; however count one point for prior convictions of Vehicle Prowling 2, and three points for each adult and juvenile prior Theft 1 (of a motor vehicle), Theft 2 (of a motor vehicle), Possession of Stolen Property 1 (of a motor vehicle), Possession of Stolen Property 2 (of a motor vehicle), Theft of a Motor Vehicle, Possession of a Stolen Vehicle, Taking a Motor Vehicle Without

Permission 1, or Taking a Motor Vehicle Without Permission 2 conviction.

(21) If the present conviction is for a felony domestic violence offense where domestic violence as defined in RCW 9.94A.030 was plead and proven, count priors as in subsections (7) through (20) of this section; however, count points as follows:

(a) Count two points for each adult prior conviction where domestic violence as defined in RCW 9.94A.030 was plead and proven after August 1, 2011, for the following offenses: A violation of a no-contact order that is a felony offense, a violation of a protection order that is a felony offense, a felony domestic violence harassment offense, a felony domestic violence stalking offense, a domestic violence Burglary 1 offense, a domestic violence Kidnapping 1 offense, a domestic violence Kidnapping 2 offense, a domestic violence unlawful imprisonment offense, a domestic violence Robbery 1 offense, a domestic violence Robbery 2 offense, a domestic violence Assault 1 offense, a domestic violence Assault 2 offense, a domestic violence Assault 3 offense, a domestic violence Arson 1 offense, or a domestic violence Arson 2 offense;

(b) Count one point for each second and subsequent juvenile conviction where domestic violence as defined in RCW 9.94A.030 was plead and proven after August 1, 2011, for the offenses listed in (a) of this subsection; and

(c) Count one point for each adult prior conviction for a repetitive domestic violence offense as defined in RCW 9.94A.030, where domestic violence as defined in RCW 9.94A.030, was plead and proven after August 1, 2011.

(22) The fact that a prior conviction was not included in an offender's offender score or criminal history at a previous sentencing shall have no bearing on whether it is included in the criminal history or offender score for the current offense. Prior convictions that were not counted in the offender score or included in criminal history under repealed or previous versions of the sentencing reform act shall be included in criminal history and shall count in the offender score if the current version of the sentencing reform act requires including or counting those convictions. Prior convictions that were not included in criminal history or in the

offender score shall be included upon any resentencing to ensure imposition of an accurate sentence.

CLARK COUNTY PROSECUTOR

September 24, 2015 - 3:19 PM

Transmittal Letter

Document Uploaded: 4-469031-Respondent's Brief.pdf

Case Name: State v. Chrystal Cox

Court of Appeals Case Number: 46903-1

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Respondent's__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Jennifer M Casey - Email: jennifer.casey@clark.wa.gov

A copy of this document has been emailed to the following addresses:

ted9@me.com